STATE OF CALIFORNIA 99 AUG 11 PM 4:15

OFFICE OF ADMINISTRATIVE LAW

SECRETARY OF STATE

In re:	)	
Request for Regulatory Determination filed by JAMES MCRITCHIE concerning Policy Resolutions BD-98-01; BD-98-02; BD-98-03; and Implementing Procedures for Policy BD-98-03 issued by the BOARD OF ADMINISTRATION OF THE PUBLIC EMPLOYEES RETIREMENT SYSTEM[1]	)	**1999 OAL Determination No. 18**
	)	**[Docket No. 98-002]**
	)	**August 11, 1999**
	)	**Determination Pursuant to Government Code Section 11340.5; Title 1, California Code of Regulations, Chapter 1, Article 3**

Determination by: **CHARLENE G. MATHIAS, Deputy Director**

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SYNOPSIS[2]

The Office of Administrative Law concludes that policies and procedures concerning gifts and contributions issued by Board of Administration of the Public Employees Retirement System are "regulations"which are invalid because they should have been, but were not, adopted pursuant to the Administrative Procedure Act. The Sacramento County Superior Court, in a decision not appealed by the state, reached the same legal conclusion.

7

DECISION [3], [4]

The Office of Administrative Law ("OAL") has been requested by James McRitchie to determine[5] whether Resolutions BD-98-01, BD-98-02, and BD-98-03 and "California Public Employees' Retirement System Disclosures, *Implementing Procedures* (4/1/98)" issued by Board of Administration of the Public Employees Retirement System ("Board") are "regulations" which are without legal effect unless adopted in compliance with the Administrative Procedure Act ("APA").[6] The resolutions and procedures require disclosure of solicitations, gifts and contributions for the stated purpose of assuring that fiduciaries of the retirement system perform their duties in an impartial manner.

OAL has concluded that Resolutions BD-98-01, BD-98-02 and BD-98-03, and "California Public Employees' Retirement System Disclosures, *Implementing Procedures* (4/1/98)" are "regulations" which must be adopted in accordance with the APA in order to be valid.

DISCUSSION

I. BACKGROUND

In 1931[7] the Legislature created the State Employees Retirement System for the purpose of:

> "effect[ing] economy and efficiency in the public service by providing a means whereby employees who become superannuated or otherwise incapacitated may, without hardship or prejudice, be replaced by more capable employees, and to that end provide a retirement system consisting of retirement compensation and death benefits."[8]

The system is housed in the State and Consumer Services Agency,[9] and has, since 1967, been known as the California Public Employees Retirement System ("CalPERS").[10] The original retirement system was directed by a Board of Administration, which continues in existence to this day.[11] Its make-up is as specified in Government Code section 20090, and it is vested with the management and control of the system under the Public Employees Retirement Law.[12]

On February 19, 1998, the Board adopted Resolutions numbered BD-98-01, BD-98-02, and BD-98-03. The resolutions concern solicitation and receipt of contributions and gifts by CalPERS fiduciaries. The resolutions authorized the Chief Executive Officer of CalPERS to implement the resolutions and procedures. Subsequently, the Board issued a three page document entitled "California Public Employees' Retirement System Disclosures, *Implementing Procedures* (4/1/98)."

On February 21, 1998, James McRitchie petitioned CalPERS pursuant to Government Code section 11340.6, requesting the promulgation of the policies contained in the resolutions pursuant to the APA. CalPERS declined to do so at that time, advising Mr. McRitchie on March 23, 1998, that the resolutions "do not meet the definition of a regulation." Unsuccessful in his effort to persuade CalPERS to promulgate the policies in accordance with APA procedures, Mr. McRitchie then submitted a request for a regulatory determination to OAL. The request challenging the three resolutions and the procedures for the implementation of BD-98-03 was received on May 1, 1998.

In a separate proceeding which arose when CalPERS sought to apply its new policies, the political committee "Kathleen Connell for Controller" challenged the validity of two of the resolutions. The matter was heard in the Sacramento Superior Court, and resulted in a judgment granting a Writ of Mandate dated September 28, 1998, prohibiting CalPERS from:

> "implementing, enforcing or otherwise giving any effect to the CalPERS Board resolutions, Nos. BD-98-01 and BD-98-02, adopted February 19, 1998, and the Implementing Procedures, dated May 19, 1998 and adopted May 20, 1998."

The court had determined that:

> "the two challenged resolutions of the Board, as well as the implementing procedures, are invalid in that they constitute regulations which were *promulgated without compliance with the Administrative Procedure Act*." (Emphasis added.)[13]

Thereafter, CalPERS commenced rulemaking to promulgate the enjoined regulations by publishing a notice in the California Regulatory Notice Register of

October 30, 1998. As of the date of this determination, the regulations have not been submitted to OAL for review pursuant to Government Code section 11349.1.

OAL published notice of its active consideration of the request for determination on February 12, 1999, initiating a public comment period. No public comments were received. The Board submitted its response to the request for determination to OAL on March 29, 1999.

II. IS THE APA GENERALLY APPLICABLE TO THE QUASI-LEGISLATIVE ENACTMENTS OF CALPERS?

The APA applies to all state agencies, except those "in the judicial or legislative departments."[14],[15] For purposes of the APA, Government Code section 11000 defines the term "state agency" as follows:

> "As used in this title [Title 2, Government of the State of California (which title encompasses the APA)], 'state agency' includes every *state* office, officer, department, division, bureau, *board*, and commission." [Emphasis added.]

The Board is in the executive branch of state government. Thus, APA rulemaking requirements generally apply to the Board, except to the extent it has been expressly exempted from the APA.[16] No specific exemption has been enacted and we therefore conclude that the APA is generally applicable to the Board. Its codified regulations are printed in the California Code of Regulations, Title 2, Division 1, Chapter 2, sections 550 to 599.515.

III. DO THE CHALLENGED POLICIES CONSTITUTE "REGULATIONS" WITHIN THE MEANING OF GOVERNMENT CODE SECTION 11342?

Government Code section 11342, subdivision (g), defines "regulation" as:

> ". . . *every* rule, regulation, order, or standard of general application *or* the amendment, supplement, or revision of any rule, regulation, order or standard adopted by *any* state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure . . . ." [Emphasis added.]

Government Code section 11340.5, authorizing OAL to determine whether agency rules are "regulations," and thus subject to APA adoption requirements, provides in part:

> "(a) *No* state agency shall issue, utilize, enforce, or attempt to enforce *any* guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as defined in subdivision (g) of Section 11342, *unless* the guideline, criterion, bulletin, manual, instruction, order, standard of general application or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]." [Emphasis added.]

In *Grier v. Kizer*,[17] the California Court of Appeal upheld OAL's two-part test[18] as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (g):

First, is the challenged rule either:

- a rule or standard of general application, *or*
- a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either:

- implement, interpret, or make specific the law enforced or administered by the agency, *or*
- govern the agency's procedure?

If an uncodified rule satisfies both parts of the two part test, OAL must conclude that it is a "regulation" and subject to the APA. In applying the two-part test, OAL is mindful of the admonition of the *Grier* court:

> ". . . because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead, . . .*, 22 Cal.3d at p. 204, 149 Cal.Rptr. 1, 583 P.2d 744), we are of the view that *any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA."* [Emphasis added.][19]

Three California Court of Appeal cases provide additional guidance on the proper approach to take when determining whether an agency rule is subject to the APA.

According to *Engelmann v. State Board of Education* (1991), agencies need not adopt as regulations those rules contained in "a statutory scheme which the Legislature has [already] established . . . ."[20] But "to the extent [that] any of the [agency rules] depart from, or embellish upon, express statutory authorization and language, the [agency] will need to promulgate regulations . . . ."[21]

Similarly, agency rules properly promulgated *as regulations* (i.e., California Code of Regulations ("CCR") provisions) cannot legally be "embellished upon" in administrative bulletins. For example, *Union of American Physicians and Dentists v. Kizer* (1990)[22] held that a terse 24-word definition of "intermediate physician service" in a Medi-Cal regulation could not legally be supplemented by a lengthy seven-paragraph passage in an administrative bulletin that went "far beyond" the text of the duly adopted regulation.[23] Statutes may legally be amended only through the legislative process; duly adopted regulations--generally speaking--may legally be amended only through the APA rulemaking process.

The third case, *State Water Resources Control Board v. Office of Administrative Law (Bay Planning Commission)* (1993), made clear that reviewing authorities are to focus on the *content* of the challenged agency rule, not the *label* placed on the rule by the agency:

> ". . . the . . . Government Code [is] careful to provide OAL authority over regulatory measures whether or not they are designated 'regulations' by the relevant agency. In other words, *if it looks like a regulation, reads like a regulation, and acts like a regulation, it will be treated as a regulation whether or not the agency in question so labeled it . . . .*" [Emphasis added.][24]

A. ARE THE CHALLENGED POLICIES "STANDARDS OF GENERAL APPLICATION"?

It is necessary to set forth the challenged resolutions, although the findings they are based upon will be omitted here.

Resolution BD-98-01 provides:

"A. *No person* who is engaged in business for gain, or seeking to engage in business for gain, with CalPERS may *make* any political contributions to a CalPERS fiduciary during the tenure of the CalPERS business relationship, or during the period they are seeking to establish such a relationship.

"B. For purposes of this Resolution:

I. 'Person' means a natural person or business entity of any type, and includes all directors, partners, officers or agents of such a business entity.

ii. 'Political contribution' means a 'campaign contribution' as defined by the Political Reform Act, or any contributions made in connection with a CalPERS Board member election.

iii. 'Engage in business with CalPERS for gain' includes any contract for goods or services, and any investment-related contract (including without limitation a limited liability company or partnership).

"C. This Resolution shall be effective immediately. However, the CalPERS Board shall hereafter adopt procedures designed to implement its terms. These procedures shall address the manner in which this Resolution is incorporated into contracts that control existing business relationships."

"D. The Chief Executive Officer of CalPERS shall have the authority to implement this resolution and related procedures, as those procedures are approved by the CalPERS Board." [Emphasis added.]

Resolution BD-98-02 provides:

"A. CalPERS fiduciaries are prohibited from knowingly *soliciting* any contribution for any purpose from a 'person' who is engaged in business for gain, or seeking to engage in business for gain, with CalPERS. However, such persons may make unsolicited contributions to charities in the name of CalPERS or any CalPERS fiduciary.

"B. CalPERS contracts shall include a requirement that these persons disclose if, in fact, contributions are solicited by a CalPERS fiduciary.

"C. For purposes of this Resolution, 'Person' means a natural person or business entity of any type, and includes all directors, partners, officers or agents of such a business entity.

"D. This Resolution shall be effective immediately. However, the CalPERS Board shall hereafter adopt procedures designed to implement its terms. These procedures shall address the manner in which this Resolution is incorporated into contracts that control existing business relationships.

"E. The Chief Executive Officer of CalPERS shall have the authority to implement this resolution and related procedures, as those procedures are approved by the CalPERS Board." [Emphasis added.]

Resolution BD-98-03 provides:

"A. All 'gifts', as defined by the Political Reform Act, received by CalPERS fiduciaries from a 'reportable source', as defined by CalPERS' Conflict of Interest Code, must be *disclosed* to the Board on a monthly basis.

"B. This Resolution shall be effective immediately. However, the CalPERS Board shall hereafter adopt procedures designed to implement its terms.

"C. The Chief Executive Officer of CalPERS shall have the authority to implement this resolution and related procedures, as those procedures are approved by the CalPERS Board." [Emphasis added.]

The request for determination also identified the *Implementing Procedures* issued by CalPERS as policies which should have been adopted as regulations. The *Implementing Procedures* indicate their purpose is:

> "to implement the Board's policies concerning the monthly disclosure of gifts (BD-98-03, 'the Policy') and related disclosure issues (see, BD-98-01 and BD-98-02)."

Three pages in length, the procedures are not set forth here, but are discussed below, and in PART II (B) of this determination.

For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.[25]

Implementing Procedures

The policies set forth in *Implementing Procedures* apply to all parties who are doing, or are seeking to do, business for gain with CalPERS; CalPERS fiduciaries; and the CalPERS staff, legal office, and Chief Executive Officer. The document contains some directives which apply only to the CalPERS legal office and executive officer. To the extent that these instructions to designated staff assign the responsibility for various tasks, they do not prescribe generally applicable standards. With this exception, however, its is clear that *Implementing Procedures* does contain standards that apply generally. For example, Procedure (3)(a)(I) requires "[a]ll parties who are seeking to do business for gain with CalPERS" to make specified disclosures. Procedure (3)(b) applies to "[a]ll parties who are engaged in business for gain with CalPERS." These groupings comprise open classes of persons subject to the standards, procedures and requirements contained in these rules.

Procedure (2)(c) provides, in part:

> "The Legal Office will use the information from the monthly reports to compile for each Board member an annual aggregated listing, to assist the Board member in completing his/her Statement of Economic Interests. After the completion of the annual aggregated listing, the monthly reports covered by that listing will be discarded. The annual aggregated listing will be retained for a period of two years."

The first sentence of Procedure (2)(c) above relates only the responsibility for a task to be performed by employees of the agency, and does not establish a standard of

general application. The second and third sentences supplement the agency's records retention policy and have general application, affecting the ability of the public to inspect the information contained in monthly reports. The implementing procedures are therefore standards of general application.

Resolutions BD-98-01, BD-98-02 and BD-98-03

Resolutions BD-98-01 and 02 apply to everyone who is engaged in business for gain, or seeking to engage in business for gain, with CalPERS. Resolutions BD-98-02 and BD-98-03 apply to CalPERS fiduciaries. The resolutions recite findings of the CalPERS Board which express concern with:

> "the potential impact of the receipt or solicitation of political contributions, from those with whom the System is doing business, on the integrity of the CalPERS decision-making process."

The findings also reveal the CalPERS Board's intention of adopting standards to be applied generally:

> "The CalPERS Board now wishes to establish business standards,[26] in addition to those found in the Political Reform Act, to afford System participants additional assurance that System fiduciaries perform their duties in an impartial manner, free from even a perception that their duty of exclusive loyalty is impaired by their own financial interests or the financial interests of persons or entities that have contributed to them."

The policies implemented by the resolutions and procedures were not formulated for a particular case or contract; most of them apply generally, to all fiduciaries, and parties who are doing, or are seeking to do, business for gain with CalPERS. They are therefore standards of general application.

B. DO THE CHALLENGED POLICIES INTERPRET, IMPLEMENT, OR MAKE SPECIFIC THE LAW ENFORCED OR ADMINISTERED BY THE AGENCY OR GOVERN THE AGENCY'S PROCEDURE?

In the administration of the Public Employees Retirement Law, one of the Board's chief responsibilities is management of the retirement fund. Government Code section 20190 provides:

> "The board has exclusive control of the investment of the retirement fund. Except as otherwise restricted by the California Constitution and by law, the board may, in its discretion, invest the assets of the fund through the purchase, holding, or sale thereof of any investment, financial instrument, or financial transaction when the investment, financial instrument, or financial transaction is prudent in the informed opinion of the board."

Pursuant to Government Code section 20191, investment decisions may be made by the affirmative vote of at least seven board members. The findings presented in the challenged resolutions reveal the Board's interest in assuring that its members' voting will not be subject to improper influence. The policies implemented by the resolutions and the procedures set forth in *Implementing Procedures* clearly interpret the laws administered by the Board and govern its procedure. For example:

1. Resolution BD-98-01 states that specified persons engaged in business for gain, or seeking to engage in business for gain, with CalPERS are prohibited from making any political contributions to a CalPERS fiduciary during the tenure of the CalPERS business relationship, or during the period they are seeking to establish such a relationship. Existing law does not contain such a prohibition. By establishing this rule, the Board has interpreted section 20190 of the Government Code and supplemented the requirements of the Political Reform Act. Resolution BD-98-01 also defines the terms "person," "political contribution," and "engage in business with CalPERS for gain." The definitions make the foregoing rule specific.

2. Resolution BD-98-02 states that CalPERS fiduciaries are prohibited from knowingly soliciting any contribution for any purpose from a "person" who is engaged in business for gain, or seeking to engage in business for gain, with CalPERS. No other provision of law establishes this restriction. By establishing this rule, the Board has supplemented the requirements of the

Political Reform Act and interpreted section 20190 of the Government Code. Resolution BD-98-02 also defines the term "person," making the prohibition of solicitation more specific.

3. Resolution BD-98-03 requires all gifts received by CalPERS fiduciaries from a reportable source to be disclosed to the Board on a monthly basis. This rule supplements the Political Reform Act[27] and the CalPERS Conflict of Interest Code[28] by requiring additional disclosures. It also aids in the implementation of the CalPERS Incompatible Activities Statement.[29]

4. *Implementing Procedures* contains a mixture of definitions, rules, and procedures. In the category of definitions, *Implementing Procedures* mentions the terms "gift" and "reportable source" and alludes generally to definitions of these terms in the Political Reform Act and in regulations of the Fair Political Practices Commission. Paragraph (1)(a) provides, in part, that:

> "[f]or purposes of the Policy [Resolution BD-98-03], a 'gift' is any item for which no consideration is given, with a value over $10, . . ."

A note explains that an attachment (Exhibit 1 to *Implementing Procedures*) summarizes the Political Reform Act's gift definitions and exclusions. Exhibit 1 was not provided to OAL with the request for determination, but our own research reveals that the Political Reform Act and implementing regulations do indeed contain an number of different definitions of the term "gift." In any event, to the extent the definition above makes the laws relating to reporting the receipt of gifts which already apply to Board members more specific, the definitions are "regulations."

In addition to definitions, *Implementing Procedures* contains rules which impose new obligations on third parties. Section (3)(a)(I) provides:

> "All parties who are seeking to do business for gain with CalPERS must *disclose* prior to any contract execution whether they have provided, or have been requested to provide, during the preceding 12 months, any gifts or campaign or charitable contributions to CalPERS Board or senior staff members, or candidates for any public office

whose subsequent election would cause the elected official to become a member of the CalPERS Board." [Emphasis added.]

This rule implements Resolution BD-98-01 by requiring disclosures as described above, and interprets the resolution's prohibition of political contributions by establishing a 12 month limitation on the period subject to disclosure requirements. This rule also helps implement Resolution BD-98-02 which prohibits a CalPERS fiduciary from knowingly soliciting any *contribution* from specified persons and Resolution BD-98-03, which requires a CalPERS fiduciary to report his or her receipt of *gifts* from a reportable source to the Board, by commanding disclosure by the contributor or gift giver. The rule set forth in section (3)(a)(I) is therefore a "regulation."

Not surprisingly, *Implementing Procedures* also establishes CalPERS procedures. For example, section (3)(c) provides:

> "The information disclosed (even if the response is that no gifts were made) will be retained in the Legal Office for a period of 12 months, and available for public inspection. The Legal Office is responsible for responding to Public Record Act requests, notifying affected Board members when information concerning gifts or contributions to them is being disclosed."

This rule sets a standard for records retention and availability that governs agency procedure. It is therefore a "regulation," as defined in Government Code section 11342, subdivision (g).

For the foregoing reasons, OAL concludes that the rules identified above as "regulations," meet both parts of the two-part test. OAL must now determine whether any of them fall within any exemptions to the requirements of the APA.

IV. DO THE CHALLENGED POLICIES FOUND TO BE "REGULATIONS" FALL WITHIN ANY RECOGNIZED EXEMPTION FROM APA REQUIREMENTS?

The Board submitted a response[30] to this request for determination arguing that the APA is inapplicable to the resolutions and implementing procedures. Nevertheless, in response to a court ruling[31] which determined that Resolutions

BD-98-01 and BD-98-02 and the Board's *Implementing Procedures* are invalid regulations, the Board is in the process of adopting[32] some provisions of these two resolutions pursuant to the APA. With respect to these two resolutions, the Board believes the request for determination is moot and it asks that OAL only address Resolution BD-98-03 and the *Implementing Procedures*. The Board's response is limited to these challenged rules.

OAL does not agree with the Board's view on mootness. OAL is required to consider all written information or evidence concerning a request submitted in compliance with Title 1, CCR, sections 122, 124 and 125, and issue a written determination as to whether the challenged state agency rule was a "regulation" at the time the request for determination was filed.[33] Actions by the Board after the request for determination was accepted by OAL cannot relieve OAL of this responsibility. Furthermore, the fact that the adoption of Board's proposed regulations has not been finalized completely undercuts the claim that the requester's challenge to Resolutions BD-98-01 and BD-98-02 is now moot.

Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless expressly exempted by statute.[34] In *United Systems of Arkansas v. Stamison* (1998),[35] the California Court of Appeal rejected an argument by the Director of the Department of General Services that language in the Public Contract Code had the effect of exempting rules governing bid protests from the APA. According to the *Stamison* Court:

> "*When the Legislature has intended to exempt regulations from the APA, it has done so by clear, unequivocal language.* (See, e.g., Gov. Code, section 16487 ['The State Controller may establish procedures for the purpose of carrying out the purposes set forth in Section 16485. These procedures are exempt from the Administrative Procedure Act.']; Gov. Code, section 18211 ['Regulations adopted by the State Personnel Board are exempt from the Administrative Procedure Act']; Labor Code, section 1185 [orders of Industrial Welfare Commission 'expressly exempted' from the APA].) [Emphasis added.]"[36]

Express statutory APA exemptions may be divided into two categories: special and general.[37] *Special* express statutory exemptions typically: (1) apply only to a portion of one agency's "regulations" and (2) are found in that agency's enabling act. *General* express statutory exemptions typically: (1) apply across the board to

all state agencies and (2) are found in the APA. An example of a *special* express exemption is Penal Code section 5058, subdivision (d)(1), which exempts pilot programs of the Department of Corrections under specified conditions. An example of an express *general* exemption is Government Code section 11342, subdivision (g), part of which exempts "internal management" regulations of all state agencies from the APA.

A. DOES THE CHALLENGED POLICY DECISION FALL WITHIN ANY *SPECIAL* EXPRESS APA EXEMPTION?

The Board's response to this request for determination explains the Board's decision to proceed with rulemaking after the decision in *Kathleen Connell for Controller et al v. CalPERS Board of Administration*. The response indicates:

> "Although the Board disagreed with the court's reasoning, it proceeded with rulemaking in the interest of efficient administration."[38]

This sentence is followed by a footnote which provides:

> "As always, the decision to enact regulations was not meant as a waiver of the Board's right to proceed by policy as necessary to fulfill its fiduciary duties. (See Cal. Const., art. XVI, sec.17.)"

In the *Connell* case, the Board claimed that the California Constitution exempts it from the APA. The argument was thoroughly rejected by the Superior Court. Although now relegated by the Board to the brief footnote above, we can find the rationale for the claim of exemption in the decision of the Court in *Connell*. Describing the Board's position, the Court wrote:

> "[N]otwithstanding the fact that it is a state agency, it is a state agency of unique status which is exempt from the Administrative Procedure Act by virtue of the passage of Proposition 162. Proposition 162 amended Article 16, section 17 of the state Constitution to read:
>
> > 'Notwithstanding any other provisions of law or this Constitution to the contrary, the retirement board of a public pension or retirement system shall have plenary

> authority and fiduciary responsibility for investment of moneys and administration of the system . . . .'
>
> "The Board argues that this language exempts it from any oversight or control by any other executive branch agency, including any such oversight or control which finds its source in the APA."[39]

Relying upon the rationale of *Singh v. Board of Retirement* [40] and *Board of Retirement v. Santa Barbara County Grand Jury,*[41] the Court in *Connell,* found that Article 16, section 17 of the state constitution does not exempt the Board from the requirements of the APA. It noted that in *Singh*, the court had:

> "reviewed the history and background of Proposition 162 and found that its purpose was twofold: to remove the authority of the Legislature to make investment decisions, and to establish firmly that the system's primary obligation was to its members."
>
> . . . .
>
> "Proposition 162 did not expressly exempt CalPERS from the provisions of the APA. Proposition 162 might only be found to have repealed by implication the rule-making provisions of the Administrative Procedure Act if those provisions interfere in some way with the Board's plenary power to invest funds and administer the system.
>
> "The Court finds that requiring the Board to comply with the APA does not interfere with the Board's constitutional powers because the APA does not give any other agency substantive power over the Board's rule-making activities."
>
> . . . .
>
> "The Third District Court of Appeal has recognized that the review power of OAL over proposed regulations is not substantive, and that it does not impermissibly interfere with the prerogatives of state agencies, even where, as here, those agencies can claim a constitutional source for their powers."

The Superior Court in *Connell* then cited *Engelmann v. State Board of Education*,[42] and noted that the CalPERS Board's claim of APA exemption was very similar to the argument of the Board of Education, rejected by the Court of Appeal in *Engelmann*. The Superior Court concluded:

> "Accordingly, the Court finds that requiring the Board to comply with the APA when adopting regulations does not conflict with the Board's 'plenary authority and fiduciary responsibility for investment of moneys and administration of the system' as set forth in Article 16, section 17 of the state Constitution."[43]

OAL agrees with the Superior Court's analysis and conclusion.

B. DOES THE CHALLENGED POLICY DECISION FALL WITHIN ANY *GENERAL* EXPRESS APA EXEMPTION?

Rules concerning certain specified activities of state agencies are not subject to the procedural requirements of the APA.[44]

INTERNAL MANAGEMENT

After issuing the challenged resolutions, the Board received a petition requesting the amendment and adoption of the rules they contain pursuant to the APA. On the occasion of rejecting the petition, and again in its response to this request for determination, the Board has argued that the resolutions do not meet the definition of a regulation because they relate only to the internal management of the state agency.

Government Code section 11342, subdivision (g), expressly exempts rules concerning the "internal management" of *individual* state agencies from APA rulemaking requirements:

> "'Regulation' means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, *except one that relates only to the internal management of the state agency.*" [Emphasis added.]

Grier v. Kizer provides a good summary of case law on internal management. After quoting Government Code section 11342, subdivision (b), the *Grier* court states:

> "*Armistead v. State Personnel Board* [citation] determined that an agency rule relating to an employee's withdrawal of his resignation did not fall within the internal management exception. The Supreme Court reasoned the rule was 'designed for use by personnel officers and their colleagues in the various state agencies throughout the state. It interprets and implements [a board rule]. It concerns termination of employment, a matter of import to all state civil service employees. It is not a rule governing the board's internal affairs. [Citation.] 'Respondents have confused the internal rules which may govern the department's procedure . . . and *the rules necessary to properly consider the interests of all . . . under the statutes. . . .*" [Fn. omitted.]' . . . [Citation; emphasis added by *Grier* court.]
>
> "*Armistead* cited *Poschman v. Dumke* [citation], which similarly rejected a contention that a regulation related only to internal management. The *Poschman* court held: 'Tenure within any school system is a matter of serious consequence involving an important public interest. The consequences are not solely confined to school administration or affect only the academic community.' . . . [Citation.][45]
>
> "Relying on *Armistead*, and consistent therewith, *Stoneham v. Rushen* [citation] held the Department of Corrections' adoption of a numerical classification system to determine an inmate's proper level of security and place of confinement 'extend[ed] well beyond matters relating solely to the management of the internal affairs of the agency itself[,]' and embodied 'a rule of general application significantly affecting the male prison population' in its custody. . . .
>
> "By way of examples, the above mentioned cases disclose that the scope of the internal management exception is narrow indeed. This is underscored by *Armistead's* holding that an agency's personnel policy was a regulation because it affected employee interests. Accordingly, even internal administrative matters do not per se fall within the internal management exception . . . ."[46]

The Board's findings included in each of the three resolutions belie the idea that the resolutions and *Implementing Procedures* govern only internal management of CalPERS. They show that the resolutions were issued to protect "the integrity of the CalPERS decision making process." This is not a matter of interest only to the Board. As indicated in finding number (7) of BD-98-01 and BD-98-02:

> "The confidence of CalPERS' membership in particular, and the public in general, in the Board's faithful stewardship of System assets is essential to the accomplishment of CalPERS' mission."

The Board's concerns and the resolutions proposed to address them are clearly matters of serious consequence affecting the interests of many. As such, they do not meet the criteria for the internal management exception to the APA.

STANDARDS INCLUDED IN CONTRACTS

The Board argues that Resolution BD-98-03 and *Implementing Procedures* are not "regulations" because "they only apply to select members of the public under the narrow circumstance of contracting to do business with CalPERS."[47] The Board reasons that standards and procedures included in a contract take effect by virtue of the contract, and not through the force of law. Continuing with this theory, the Board argues that the standards contained in Resolution BD-98-03 and *Implementing Procedures* therefore do not apply generally. For these two reasons, the Board concludes that the standards and procedures are not "regulations."

The Board's theory for the implied exemption of standards and procedures contained in a contract is based upon a series of four cases: *City of San Joaquin v. State Board of Equalization* (1970), *Grier v. Kizer* (1990), *Roth v. Department of Veteran Affairs* (1980), and *Nadler v. California Veterans Board* (1984).

In *City of San Joaquin,* the city challenged a sales tax revenue pooling procedure utilized by the Board of Equalization to divide the revenue it had collected from local sales taxes on construction contracts among cities in a county-wide pool. The City of San Joaquin had argued that the procedure utilized by the Board of Equalization was a "regulation." The Court of Appeal, Fifth District, ruled that procedure was not a "regulation." The court continued:

"According to the evidence, it is merely a statistical accounting technique to enable the Board to allocate, as expediently and economically as possible, to each city which has joined the Uniform Sales and Use Tax program, its fair share of sales taxes collected by the Board on that city's behalf. Moreover, this accounting technique was worked out by the Board and the representatives of interested cities and counties and *was made a part of the 'standard' contract* which San Joaquin ultimately signed, without protest or objection of any kind.

". . . the manner to be used by the Board in allocating the taxes which it collects is an appropriate subject for contractual negotiation between the interested parties.

". . . the city did not object to the provision when it signed the contract." [Emphasis added.][48]

City of San Joaquin no longer supports the proposition that a standard accounting procedure adopted by an agency and included in a contract between the agency and others may be exempt from the APA. In *Grier v. Kizer,* the Department of Health Services had utilized an auditing method which involved sampling to review Medi-Cal billings by physicians, including Dr. Grier. The sampling method was challenged as an underground regulation. The Court of Appeal, Second District, ruled that the sampling method was a "regulation," using the occasion to question the decision in *City of San Joaquin.*

"In view of the Supreme Court's subsequent recognition [in 1976] in *Armistead* of the distinction between purely internal rules which merely govern an agency's procedure and rules which have *external impact* so as to invoke the APA [citations omitted] *San Joaquin*'s holding that statistical accounting techniques are exempt from the APA appears to have lost its precedential value. After *Armistead*, it would appear an accounting procedure resulting in a possibly disproportionate allocation of tax revenues would be the appropriate subject of a regulation adopted pursuant to the APA, allowing interested parties to be heard on the merits of the proposed rule." [Emphasis added.][49]

While acknowledging that *San Joaquin* lost its precedential value after *Grier v. Kizer*, the Board nevertheless argues that an exception from the APA still exists for standards set forth in a contract. According to this theory, where the agency's standards are included in a contract between the agency and a party, they are essentially effective through the party's acceptance, and, so long as the standards only affect *prospective* duties and rights, they are not "regulations." Mixed in with this idea, the Board also argues that such standards do not have general application.

The Board identifies *Nadler* as authority for the proposition that an agency may choose whether to include generally applicable standards in regulations or in its contracts. To understand *Nadler*, however, we must first discuss *Roth*, an earlier case. In *Roth* the Department of Veteran Affairs had been charging borrowers late fees for late payment even though their loan agreements did not provide for a late fee, and no statute or regulation provided for such a fee. The borrowers argued that the late fee was an underground regulation. The Department of Veteran Affairs claimed the late fee was not a standard of general application because it did not apply to all citizens in the state. The Court of Appeal in *Roth*, citing *Schlageter Estate Co. v. Koontz,*[50] correctly noted in 1980 that

> "the word 'general' means pertaining to all of the members of a class, kind, or order. For a rule of a public entity to be 'of general application,' it does not have to apply to all the citizens of the state."[51]

This point of law is now well settled. The court in *Roth* ruled against the Department of Veteran Affairs because it found that its late fee was not included in the loan agreement, and was not provided for in any applicable provision of law. This court also observed:

> "We have no quarrel with the proposition that defendant [the Department] could have, if it wished, provided in its contract with the veteran for an additional reasonable charge if a periodic payment on the purchase price were not made within the time provided by the contract . . . ."[52]

Four years later, in 1984, in *Nadler v. California Veterans Board,*[53] the Court of Appeal, commenting on *Roth,* made essentially the same observation. The CalPERS Board relies upon *Nadler,* claiming that it supports the existence of an APA exemption for some types of contracts. The Board claims:[54]

> "[T]he *Nadler* court considered whether the California Veterans Board could assess late charges against a veteran who had entered into a Cal-Vet housing contract, absent rulemaking. The court ruled:
>
> > 'A reading of the decision in *Roth*, however, makes it abundantly clear that if either the Act or the particular Cal-Vet contracts at issue had provided for late charges then compliance with the APA would have been unnecessary.'

The Board's argument is misleading. Although presented as the ruling of the *Nadler* court, it is actually that court's commentary on the decision in *Roth*. *Nadler* did not concern late charges; rather, the issue was whether a veteran who did not reside in the home he was financing was entitled to continued Cal Vet financing. The Military and Veterans Code required a veteran with a home loan to actually reside on the property being financed. The Court determined that the Department's understanding of the meaning of "reside" was the only legally tenable interpretation of the statutes, rather than an administrative regulation. As the *Nadler* Court stated:

> "Since we have concluded that *the Act*[55] *does not permit Nadler to obtain the benefits he seeks* no action or inaction of the Department can confer a right to such benefits upon Nadler." [Emphasis added.][56]

Therefore, the *Nadler* Court's discussion of *Roth* did not pertain directly to the decision in the case; rather it repeated an observation previously made in *Roth*. That observation, critical to the Board's claim that contract provisions may be exempt from the APA, is not persuasive, even when traced to its source. *Roth,* arose from an action founded upon a contract that *did not include* a late payment fee. Speculation about the effect such a provision might have had, *if it had been part of the bargain*, is collateral to the decision in the case. Thus, we see that neither *Roth* nor *Nadler* presented the question of whether a general policy of charging a late payment fee could be implemented through contract alone.

The language relied upon so heavily by the Board concerns a hypothetical question, and is dicta. Its application should be limited to contract provisions in veterans' loan agreements. It is not persuasive authority for the broader proposition proclaimed by the Board that it may choose whether to proceed by rulemaking or contracting. If the Board were actually free to implement important public policy through contract provisions whenever its ability to control contractors offered the

means to give those policies effect, then this would be a major loophole in the protections afforded to the regulated public by the APA.

In crafting its argument for a contracts exemption from the APA, the Board has focused on the reasonableness of an agency's negotiating contract terms with those entities with which it will do business. It contrasts its own use of standards in contracts affecting *prospective* transactions with the situations presented in *San Joaquin* and *Kizer,* where allowing the agency to unilaterally use an underground regulation "could result in the loss of revenues already taxed to, or billed by, affected members of the public."[57] We agree that a contracting party's acceptance of standards may arguably make their use in that relationship reasonable. Using the Board's example derived from *Roth*, it is plain that the impact of a late fee falls upon a borrower who has not submitted his payment on time. There is an attendant benefit to the state (the lender), but a reasonable fee is typically only sufficient to cover the additional expense associated with late payment. Hence, when no late fee has been prescribed by law, and the Department and a borrower freely enter into an a loan contract that prescribes a late fee, the public interest implicated by the terms of the loan is minor. Charging a late payment fee may arguably be reasonable, and by extension, the Board's policies for contracting may arguably be reasonable between the contracting parties as well.

It would, nevertheless, be a mistake to conclude that a standard policy of requiring a late fee is not a "regulation" because it is arguably reasonable, or its impact is arguably minor. A regulation prescribing an agency's internal management may be exempt from the APA when it does not involve a matter of serious consequence affecting the interests of many, but there is no comparable exemption for regulations which are not limited to internal agency management. Therefore, in our view, the policy of charging a late payment fee should have been adopted as a regulation. Even if we were to give credence to the theory that a late payment penalty could be implemented through standard contract terms instituted without rulemaking, it is readily apparent that the standards actually challenged in this request for determination are quite different from a reasonable late fee included in an agreement between a lender and a borrower.

Some of the provisions in Resolutions BD-98-01, BD-98-02 and , BD-98-03 have effects well beyond the contractual relationship between CalPERS and its contractors.[58] This is amply demonstrated by the findings included in the resolutions, which prompted their promulgation. As noted above in the discussion

of internal management, the resolutions and *Implementing Procedures* were adopted to preserve the

> "confidence of CalPERS' membership in particular, and the public in general, in the Board's faithful stewardship of System assets . . . essential to the accomplishment of CalPERS' mission."

Under these circumstances, the use of standard contract terms to implement the standards contained in the resolutions cannot obviate compliance with the APA.

The Legislature intended that there be no APA exemption for contract provisions. Exempting public contracts was--and is--a clear policy alternative. The federal APA, first enacted in 1946, exempts "*matter relating to* agency management or personnel or to public property, loans, grants, benefits or *contracts*" from rulemaking requirements. [Emphasis added.][59] Congress included the exemption to assure that the notice provision of the APA would not be used to restrain the government's administration of public contracts where the government has a "proprietary" interest.[60] Congress viewed the exempted activities as proprietary in character and exempted them because:

> "the principle considerations in most such cases relate to mechanics and interpretations or policy, and it is deemed wise to encourage and facilitate the issuance of rules by dispensing with all mandatory procedural requirements."[61]

Nevertheless, the public contracts exemption of the federal APA has been the subject of much criticism. Even construed narrowly, it "cuts a wide swath through the safeguards generally imposed on agency action."[62] Referring to the federal APA's exemption for public property, loans, grants, benefits or contracts, the United States Court of Appeals, D.C. Circuit, noted in *National Wildlife Federation v. Snow*:[63]

> "[T]he APA does create *a serious gap in the procedural protections the APA was enacted to provide.* At least in the context of the federal highway grant-in-aid program, we can find no principled way to remedy that gap by a narrowing construction. As a matter of policy, Congress might have done better to anticipate that the federal grant and benefit programs the government would come to administer would

> have a direct policy impact on individual citizens and society as a whole. Its desire that legislative functions in administrative agencies 'be exercised only upon some form of public participation after notice' might better have been served by recognizing that spending money always involves public choices, often significant public choices that could benefit from the ventilation of views that public participation entails." [Emphasis added.]

When it enacted the state APA in 1947, the California Legislature decided not to create a comparable gap. It rejected a proposal to exempt "any interpretative rule or any rule relating to public property, public loans, public grants or *public contracts*" from APA notice and hearing requirements.[64] The California APA evidences:

> "a desire to achieve in the California APA a much greater coverage of rules than Congress sought in the federal APA."[65]

For the foregoing reasons, it is clear that the state APA offers no exemption for regulations issued by an agency in its contracts.[66]

No other exemptions apply.

CONCLUSION

For the reasons set forth above, OAL concludes that Board Policy Resolutions BD-98-01, BD-98-02 and BD-98-03 and *Implementing Procedures* contain "regulations" subject to the APA.

DATE: August 11, 1999

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ENDNOTES

1. This request for determination was filed by James McRitchie, 2461 Second Avenue, Sacramento, CA 95818, (916) 327-1194, on May 1, 1998. The CalPERS response, dated March 29, 1999, was submitted by Maureen Reilly, Senior Staff Counsel, CalPERS Legal Office, Lincoln Plaza, 400 P Street, Sacramento, CA 95814 (916) 558-4097.

2. This determination may be cited as **"1999 OAL Determination No. 18."**

3. *OAL Determinations are Entitled to Great Weight in Court*

In *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, disapproved on other grounds in *Tidewater,* the California Court of Appeal considered whether the Department of Health Services' use of an audit method based on probability sampling and statistical extrapolation constitutes a regulation within the meaning of section 11342, subdivision (g). OAL had previously issued a determination concluding that the audit rule met the definition of "regulation," and therefore was subject to APA requirements. **1987 OAL Determination No. 10**, CRNR 96, No. 8-Z, February 23, 1996, p. 293. Concerning the treatment of **1987 OAL Determination No. 10**, which was submitted for its consideration in the case, the court found:

> "While the issue ultimately is one of law for this court, 'the contemporaneous administrative construction of [a statute] by those charged with its enforcement and interpretation is *entitled to great weight*, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. [Citations.]' [Citations.] [Par.] Because [Government Code] section 11347.5, [now 11340.5] subdivision (b), charges the OAL with interpreting whether an agency rule is a regulation as defined in [Government Code] section 11342, subdivision (b) [now subd. (g)], *we accord its determination due consideration.*" [*Id.*; emphasis added.]

See also *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886 (same holding) and note 5 of **1990 OAL Determination No. 4,** California Regulatory Notice Register 90, No. 10-Z, March 9, 1990, p. 384, at p. 391 (reasons for according due deference consideration to OAL determinations).

4. OAL does not review alleged underground regulations for compliance with the APA's six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. However, in the event regulations were proposed by the Department under the APA, OAL would review the *proposed* regulations for compliance with the six statutory criteria. (Government Code sections 11349 & 11349.1.)

5. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), subsection 121 (a), provides:

"'*Determination*' means a finding by OAL as to whether a state agency rule is a 'regulation,' as defined in Government Code section 11342(g), which is *invalid and unenforceable* unless

(1) it has been adopted as a regulation and filed with the Secretary of State pursuant to the APA, or,

(2) it has been exempted by statute from the requirements of the APA. [Emphasis added.]"

See *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, review denied (finding that Department of Health Services' audit method was *invalid* because it was an underground regulation which should be adopted pursuant to the APA); and *Planned Parenthood Affiliates of California v. Swoap* (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 (now 11340.5) in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b)--now subd. (g)-- yet had not been adopted pursuant to the APA, was "*invalid*"). We note that a 1996 California Supreme Court case stated that it "disapproved" of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577, 59 Cal.Rptr. 2d 186, 198. *Grier*, however, is still authoritative, except as specified by the *Tidewater* court. *Tidewater* itself, in discussing which agency rules are subject to the APA, referred to "the two-part test of the Office of Administrative Law," citing *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from *Grier v. Kizer.*

6. According to Government Code section 11370:

"*Chapter 3.5* (commencing with Section 11340), *Chapter 4* (commencing with Section 11370), *Chapter 4.5* (commencing with Section 11400), *and Chapter 5* (commencing with Section 11500) *constitute,* and may be cited as, *the Administrative Procedure Act.*" [Emphasis added.]

OAL refers to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Administrative Regulations and Rulemaking") of Division 3 of Title 2 of the Government Code, sections 11340 through 11359.

7. Statutes of 1931, Chapter 700.

8. Government Code section 20001.

9. Government Code section 20002.

10. Statutes of 1967, Chapter 84, section 3.

11. Government Code section 20090.

12. Government Code sections 20000 to 22960.100.

13. Ruling on Submitted Matter: Petition for Writ of Mandate dated 9/17/98, p. 4.

14. Government Code section 11342, subdivision (a).

15. See *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 126-128, 175 Cal.Rptr. 744, 746-747 (unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of the APA when engaged in quasi-legislative activities); *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 942, 107 Cal.Rptr. 596, 603 (agency created by Legislature is subject to and must comply with APA).

16. Government Code section 11346; Title 1, CCR, section 121 (a)(2).

17. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251. OAL notes that a 1996 California Supreme Court case stated that it "disapproved" of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577. *Grier*, however, is still good law, except as specified by the *Tidewater* court. Courts may cite cases which have been disapproved on other grounds. For instance, in *Doe v. Wilson* (1997) 57 Cal.App.4th 296, 67 Cal.Rptr.2d 187, 197, the California Court of Appeal, First District, Division 5 cited *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 107 Cal.Rptr. 596, on one point, even though *Poschman* had been expressly disapproved on another point nineteen years earlier by the California Supreme Court in *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 204 n. 3, 149 Cal.Rptr. 1, 3 n. 3. Similarly, in *Economic Empowerment Foundation v. Quackenbush* (1997) 57 Cal.App.4th 677, 67 Cal.Rptr.2d 323, 332, the California Court of Appeal, First District, Division 4, nine months after *Tidewater*, cited *Grier v. Kizer* as a distinguishable case on the issue of the futility exception to the exhaustion of administrative remedies requirement.

Tidewater itself, in discussing which agency rules are subject to the APA, referred to "the two-part test of the Office of Administrative Law," citing *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from *Grier v. Kizer.*

18. The *Grier* Court stated:

> "The OAL's analysis set forth a two-part test: 'First, is the informal rule either a rule or standard of general application or a modification or supplement to such a rule? [Para.] Second, does the informal rule either implement, interpret, or make specific the law enforced by the agency or govern the agency's procedure?' (1987 OAL Determination No. 10, . . . slip op'n., at p. 8.) [*Grier*, disapproved on other grounds in *Tidewater*]."

OAL's wording of the two-part test, drawn from Government Code section 11342, has been modified slightly over the years. The cited OAL opinion--**1987 OAL Determination No. 10**--was published in California Regulatory Notice Register 96, No. 8-Z, February 23, 1996, p. 292.

19. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253. The same point is made in *United Systems of Arkansas v. Stamison* (1998) 63 Cal.App.4th 1001,1010, 74 Cal.Rptr.2d 407, 412, review denied.

20. 2 Cal.App.4th 47, 62, 3 Cal.Rptr.2d 264, 275, review denied.

21. *Id.*

22. 223 Cal.App.3d 490, 501, 272 Cal.Rptr. 886, 891.

23. (1993) 12 Cal.App.4th 697, 702, 16 Cal.Rptr.2d 25, 28.

24. (1993) 12 Cal.App.4th 697, 702, 16 Cal. Rptr.2d 25, 28.

25. *Id.*

26. Resolutions BD-98-01 and BD-98-02, finding number 8. Resolution BD-98-03, finding number 6 is similar, with the words "greater disclosure" in place of the words "business standards."

27. Government Code, Title 9, sections 81000 - 91014.

28. Title 2, CCR, section 560.

29. Title 2, CCR, section 558. Section 558 provides, in part:

> "The following activities are deemed to be inconsistent, incompatible, in conflict with, or inimical to the duties of PERS officers or employees:
>
> "(1) - (6) . . .
>
> "(7) Receiving or accepting, directly or indirectly, any gift, including money, or any service, gratuity, favor, entertainment, hospitality, loan, or any other thing of value from anyone who is doing or is seeking to do business of any kind with the Public Employees' Retirement System or whose activities are regulated or controlled by PERS under circumstances from which it reasonably could be substantiated that the gift was intended to influence the officer or employee in his or her official duties or was intended as a reward for any official actions performed by the officer or employee."

30. Title 1, California Code of Regulations ("CCR"), subsection 125 (b).

31. *Kathleen Connell for Controller et al. v. CalPERS Board of Administration* (Sacramento County Superior Court Case No. 98CS01749).

32. A notice of proposed rulemaking was published in California Regulatory Notice Register 98, No. 44-Z, October 30, 1998, p. 2153. The proposed regulations have not yet been submitted for OAL review.

33. Title 1, CCR, sections 122, 123, 124, 125, and 126.

34. Government Code section 11346.

35. 63 Cal.App.4th 1001, 1010, 74 Cal.Rptr.2d 407, 411-12, review denied.

36. 63 Cal.App.4th at 1010, 74 Cal.Rptr.2d at 411.

37. Cf. *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 126, 174 Cal.Rptr. 744, 747 (exemptions found either in prevailing wage statute or in the APA itself).

38. Board response, p. 2.

39. Ruling on Submitted Matter: Petition for Writ of Mandate dated 9/17/98, p. 5.

40. (1996) 41 Cal.App.4th 1180.

41. (1997) 58 Cal.App.4th 1185.

42. (1991) 2 Cal.App.4th 47, 3 Cal.Rptr.2d 264

43. Ruling on Submitted Matter: Petition for Writ of Mandate dated 9/17/98, p. 9.

44. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:

    a. Rules relating *only* to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (g).)

    b. Forms prescribed by a state agency or any instructions relating to the use of the form, *except* where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec.11342, subd. (g).)

    c. Rules that "[establish] or [fix], *rates, prices, or tariffs*." (Gov. Code, sec. 11343, subd. (a)(1); emphasis added.)

d. Rules directed to a *specifically named* person or group of persons *and* which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)

e. Legal rulings *of counsel* issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342. subd. (g).)

45. *Armistead* disapproved *Poschman* on other grounds. (*Armistead, supra*, 22 Cal.3d at 204, n. 2, 149 Cal.Rptr. 1, 583 P.2d 744.)

46. (1990) 219 Cal.App 3d 422, 436, 268 Cal.Rptr. 244, 252-253.

47. CalPERS Response to Request for Determination, March 29, 1999, p. 3.

48. 9 Cal.App.3d 365, 375, 88 Cal.Rptr. 12, 20.

49. 219 Cal.App.3d 422, 437, 268 Cal.Rptr. 244, 253.

50. (1950) 97 Cal.App.2d 814, 819, 218 P.2d 814.

51. (1980) 110 Cal.App.3d 626, 631, 167 Cal.Rptr. 552, 556.

52. 110 Cal.App.3d 626, 627, 167 Cal.Rptr. 552, 554.

53. (1984) 152 Cal.App.3d 707, 199 Cal.Rptr. 546.

54. CalPERS Response to Request for Determination, March 29, 1999, pp. 3 - 4.

55. The Veterans' Farm and Home Purchase Act of 1974.

56. 152 Cal.App.3d 707, 718, 199 Cal.Rptr. 546, 553.

57. CalPERS Response to Request for Determination, March 29, 1999, p. 4.

58. *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 128, 174 Cal.Rptr. 744, 747.

59. Title 5, U.S.C. section 553(a)(2).

60. *Housing Authority of the City of Omaha, Nebraska v. United States Housing Authority* (8th Cir. 1972) 468 F.2d 1, 9.)

61. *National Wildlife Federation v. Snow* (D.C. Cir. 1976) 561 F.2d 227, 231, quoting, "Legislative History" at 199 (Senate Report).

62. *Munitions Carriers Conference, Inc. v. U.S.* (D.D.C. 1996) 932 F.Supp. 334, 336.

63. *National Wildlife Federation v. Snow* (D.C. Cir. 1976) 561 F.2d 227, 231.

64. SB 824 (1947/DeLap) initially provided that public contracts were exempt from the APA. This provision was amended out, and then SB 824 died in committee. A competing bill, AB 35, which did *not* exempt public contracts from the APA, was approved by the Legislature and chaptered as 1947, ch. 1425.

65. *Armistead v. State Personnel Board* (1978) 22 Cal. 3d. 198, 201, Sup., 149 Cal.Rptr. 1, 2.

66. A recent unpublished decision of the Court of Appeal, Third Appellate District, confirms the correctness of this conclusion. In *Back v. Department of Food and Agriculture*, (3 Civ. C025630 (Super. Ct. No. 96CS01124) filed 5/4/99) the Department's Division of Fairs and Expositions had required District Agricultural Associations to utilize standard terms in their contracts with gun show promoters. The trial court had upheld the Department's use such standards as "a lawful exercise of its proprietary rights and responsibilities." The Court of Appeal reversed, noting that "the trial court erred by creating the kind of implied proprietary [contracts] exemption the Legislature chose not to provide in the California APA."